IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.243 OF 2005

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Controller of Stores ...Petitioner

v/s.

Rotomac Electricals Pvt.Ltd. ...Respondent

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Mr.Suresh Kumar for the Petitioner.

Mr.D.D.Madon i/b U.S.Samudrala for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 29TH NOVEMBER,2005

P.C.:

1. By this petition the Petitioner challenges the award made by the sole arbitrator dated 31-01-2005 awarding an amount of Rs.4,18,019.07 against claim No.1 and an amount of Rs.1,00,206/- against claim No.5. It appears that the Petitioner had entered into a contract whereby the Respondent was to supply 60 sets of powers and equalizer coils for Armature to the Petitioner. Time was fixed in the contract for effecting the supply. Admittedly, 30 sets off 60 sets for which the order was placed were supplied within the time fixed by the contract. Balance 30 sets were not supplied in time. The Respondent applied for extension of time to complete the supply. Extension of time was granted and admittedly during the extended time the balance 30 sets were supplied. The Petitioner, however, deducted liquidated damages as per the terms of the contract in relation to the supply of 30 sets which were made during the extended period. The case of the Respondent was that the liquidated damages were wrongly deducted. It appears that during the inspection of the sets, two sets were

damaged. The Respondent was claiming price of the damaged sets. Claim regarding refund of liquidated damages deducted by the Petitioner was claim No.1 and the price of the two damaged sets claimed by the Respondent was claim No.5.

2. In so far as claim No.1 is concerned, the defence of the Petitioner was that the supply was not admittedly made during the time fixed in the contract. Extension of time to complete the supply was granted subject to the condition that the Petitioner would be entitled to claim liquidated damages for the delayed supply and therefore, an order for refund of the liquidated damages deducted by the Petitioner cannot be made. So far claim No.5 is concerned, the defence of the Petitioner was that the price of the two damaged sets cannot be awarded to the Respondent. There were other claims also.

3. The learned arbitrator decided all the claims by the award which is impugned in the petition. The learned arbitrator granted the amounts to the Respondent only against claim No.1 and claim No.5. Claims Nos. 2, 3 and 4 have been rejected.

4. The learned arbitrator against Claim No.1 held that delay in completion of the supply was caused not entirely due to the Respondent, but the Petitioner was also responsible for the delay. The learned arbitrator also held that the liquidated damages can be levied only in case of serious loss to the Petitioner. So far as claim No.5 is concerned, the learned arbitrator awarded an amount of Rs.1,00,206.00 after observing that the Respondent has not led any evidence to prove his claim.

5. The learned counsel appearing for the Petitioner submits that the finding recorded by the learned arbitrator that 18 sets which were offered for inspection on 6-7-1995 were "O.K." is factually incorrect. The learned Counsel further submits that the clause in the contract permitted the Petitioner to deduct the liquidated damages in case there is delay in completing the supply. It was not the case of the Respondent that the Petitioner has not suffered any loss because of delay in supply and therefore in terms of the law laid down by the Supreme Court in its judgment in the case of ONGC Ltd. v/s. Saw Pipes Ltd., (2003) 5 SCC 705 the Petitioner was entitled to deduct liquidated damages.

The finding recorded by the learned arbitrator that because there is no serious loss caused to the Petitioner, liquidated damages cannot be deducted is contrary to the law. It is further submitted that so far as Claim No.5 is concerned, the learned arbitrator himself has observed that the Respondent did not lead any evidence to show what was the exact amount of expenses incurred by the Respondent either for repair or remanufacture of the two sets and therefore finding recorded by the learned arbitrator is not based on any evidence and therefore, the award made against claim No.5 is liable to be set aside.

6. The learned Counsel appearing for the Respondent, in so far as claim No.1 is concerned, relies on clauses 0800 and 0702 of the contract between the parties and submits that liquidated damages cannot be levied if the contract is completed within the extended period. He also relies on note No.1 appearing in the extension letter at Exh.I to the petition. According to the learned Counsel as the supply was completed within the extended period, there is no question of levying any liquidated damages. So far as claim No.5 is concerned, the learned Counsel submits that the two sets were

completely damaged during the inspection. They were required to be remanufactured, therefore, the costs of remanufacturing the same is claimed. The learned arbitrator has awarded Rs.1,00,206.00 against that claim and therefore that part of the award cannot be challenged.

7. If in the light of these rival submissions the record of the case is perused, it becomes clear that the supply has been completed within the extended period. Clauses 0702 and 0800 which have been relied on by the learned counsel appearing for the Respondent reads as under:-

> 0702 **Failure and Termination.-** If the Contractor fails to deliver the store or any instalment thereof within the period fixed for such delivery in the contract or as extended or at any time repudiates the contract before the expiry of such period the Purchaser may without prejudice to his other rights-
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> (a) recover from the contractor as agreed liquidated damages and not by way of penalty a sum equivalent to 2 per cent of the price of any stores (including elements of taxes, duties, freight, etc.) which the Contractor has failed to deliver within the period fixed for delivery in the contract or as extended for each month or part of a month during which the delivery of such stores may be in arrears where delivery thereof is accepted after expiry of the

aforesaid period, or

(b) cancel the contract or a portion, thereof and if so desired purchase or authorise the purchase of the stores not so delivered or others of a similar description (where stores exactly complying with particulars are not in, the opinion of the Purchaser, which shall be final, readily procurable) at the risk and cost of the Contractor. It shall, however, be in the discretion of the purchaser to collect or not the security deposit from the firm/firms on whom the contract is placed at the risk and expense of the defaulted firm.

Where action is taken under Sub-clause (b) above, the Contractor shall be liable for any loss which the Purchaser may sustain on that account provided the purchase, or, if there is an agreement to purchase, such agreement is made in case of failure to deliver the stores within the period fixed for such delivery in the contract or as extended within six months from the date of such failure and in case of repudiation of the contract before the expiry of the aforesaid period of delivery, within six months from the date of cancellation of the contract. The Contractor shall not be entitled to any gain on such purchase and the manner and method of such purchase shall be in the entire discretion of the Purchaser. It shall not be necessary for the Purchaser to serve a notice of such purchase on the Contractor.

Note.- In respect of the stores which are not easily available in the market and where procurement difficulties are experienced, the period for making risk purchase shall be nine months instead of six months provided above.

0800. **Extension of Time for Delivery.-** If such failure as aforesaid shall have arisen from any cause which the Purchaser may admit as reasonable ground for extension of

> time, the Purchaser shall allow such additional time as he considers to be justified by the circumstance of the case, and shall forego the whole or such part, as he may consider reasonable of his claim for such loss or damage as aforesaid. Any failure or delay on the part of sub-contractor, through their employment may have been sanctioned under Condition 1500, hereof shall not be admitted as a reasonable ground for any extension of time or for exempting the Contractor from liability for any such loss or damage as aforesaid.

8. Perusal of the above clauses in the contract shows that the liquidated damages can be recovered if supply is not completed within the period fixed by the contract or during the period that is to be extended by the Petitioner. Perusal of the clause 0800 shows that it relates to the power of the Petitioner to grant extension of time. It also shows that while granting extension of time, the Petitioner can forgo as a whole or a part of its claim for liquidated damages. It is in the exercise of the power conferred by clause 0800 that the railway issued an order dated 5-9-1994 at Exh.I to the petition. By that order time for completing the supply was extended till 30-4-1996. But in the order it was specifically stated that extension of delivery date is granted subject to recovery of an

amount equal to bid amount as liquidated damages. Thus, the Petitioner had reserved its right while granting extension of time to levy liquidated damages. I do not find any justification for holding that, in view of the clear recital in clause 0800 that if extension of time is granted and supply is completed within the extended time, no damages can be levied. Perusal of the award shows that the learned arbitrator has also not recorded such a finding. The learned arbitrator has held that liquidated damages are levied, when the delay is not much and when there is no proof of serious loss suffered by the Petitioner. Thus, one of the consideration that definitely weighed with the learned arbitrator for directing refund of amount of liquidated damages is that the Petitioner has not suffered serious loss. As it was not the case of the Respondent that the Petitioner has not suffered any loss, in view of the judgment of the Supreme Court in the case of ONGC v/s. Saw pipe (supra) , and the clear recitals in clause 0702 of the contract it was not necessary for the Petitioner to prove any loss in order to be entitled to deduct the amount of liquidated damages, and therefore, in my opinion, the award made against Claim No.1 is liable

to be set aside on this ground alone. I also find that there is considerable substance in the submission of the learned counsel appearing for the Petitioner that the finding recorded by the learned arbitrator that when balance 18 sets were presented for inspection, the inspection team found the sets to be O.K. This finding is contrary to the report of the inspection team, which shows that 18 sets were rejected as they were not as per the drawing. In my opinion, for all these reasons the award made by the learned arbitrator against claim No.1 is liable to be set aside. So far as claim No.5 is concerned, perusal of the award itself shows that it has been made by the learned arbitrator without any evidence. The relevant part reads as under:-

> "The claim is for Bank interest charges, management overheads/ unutilized costs for 5 months extra period and Rs.1,40,000/- for remanufacture of 2 sets of coils damaged by inspection team. As already discussed against Claim No.2, there is no justification for extra 5 months and hence all such claims arising out of this area not tenable. The Tribunal however is

inclined to consider claim for remanufacture of 2 sets of coils damaged by the inspection team. It has been established that while consignee was discussing changes in insulation scheme with the Claimant, he failed to advise the inspection team about it resulting in this unnecessary national wastage. While it is not possible to substantiate this claim in the absence of any working sheet, the Tribunal considers 50% of the cost of two sets as a suitable compensation against damage caused to 2 sets as part compensation to this claim. Since rate as per purchase order was Rs.1,00,206/- per set. Tribunal considers an amount of Rs.1,00,206/- (50% for each set) as sufficient compensation for two sets. No further interest is payable on this amount being in the nature of compensation. Thus an amount of Rs.1,00,206/- is awarded against this claim as a whole.

9. So far as the claim statement is concerned,

perusal of claim statement shows that the Respondent was claiming an amount of Rs.1,40,000/- as costs of remanufacture of 2 sets coils damages by the inspection team wrongfully less scrap value. This claim was not replied to in the reply by the Petitioner. Therefore, in terms of the provisions of Section 28 it was for the Respondent to lead evidence to show firstly that the two sets were damaged entirely due to the fault of the inspection team. What was the extent of damage caused to the two sets and what was expenditure incurred for remanufacturing the two sets, as also what was the scrap value of the damaged sets and how he has arrived at that scrap value. Perusal of the award shows that the Respondent did not lead any evidence to establish any of these facts. The Arbitrator on his own held that the Respondent is entitled to 50% of the costs of the two sets. It is obvious that the award against claim No.5 is not based on any evidence on record. The Respondent was claiming Rs.1,40,000/- as costs of remanufacture of two sets less the scrap value. Obviously, therefore, according to the Respondent, costs of remanufacture was less than Rs.70,000/-, because he has deducted the amount of scrap value. The learned arbitrator

has not taken into consideration the manufacturing costs, but has taken into consideration the costs at which the sets were supplied according to contract and has arbitrarily held that the Respondent is entitled to 50% of that costs. It thus appears that at the costs of the Petitioner the arbitrator has chosen to be generous to the Respondent in awarding the claim. The award made against claim No.5 is, therefore, liable to be set aside.

10. In the result, therefore, the petition succeeds and is allowed. The award made by the learned arbitrator against claim No.1 and claim No.5 is set aside. The Respondent is directed to pay costs of this petition to the Petitioner, as incurred by the Petitioner.

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